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Brief of Stiles for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

L. H. HYER, APPELLANT,

vs.

RICHMOND TRACTION COMPANY ET AL.,
APPELLEES.

BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR CERTIORARI.

ROBERT STILES,
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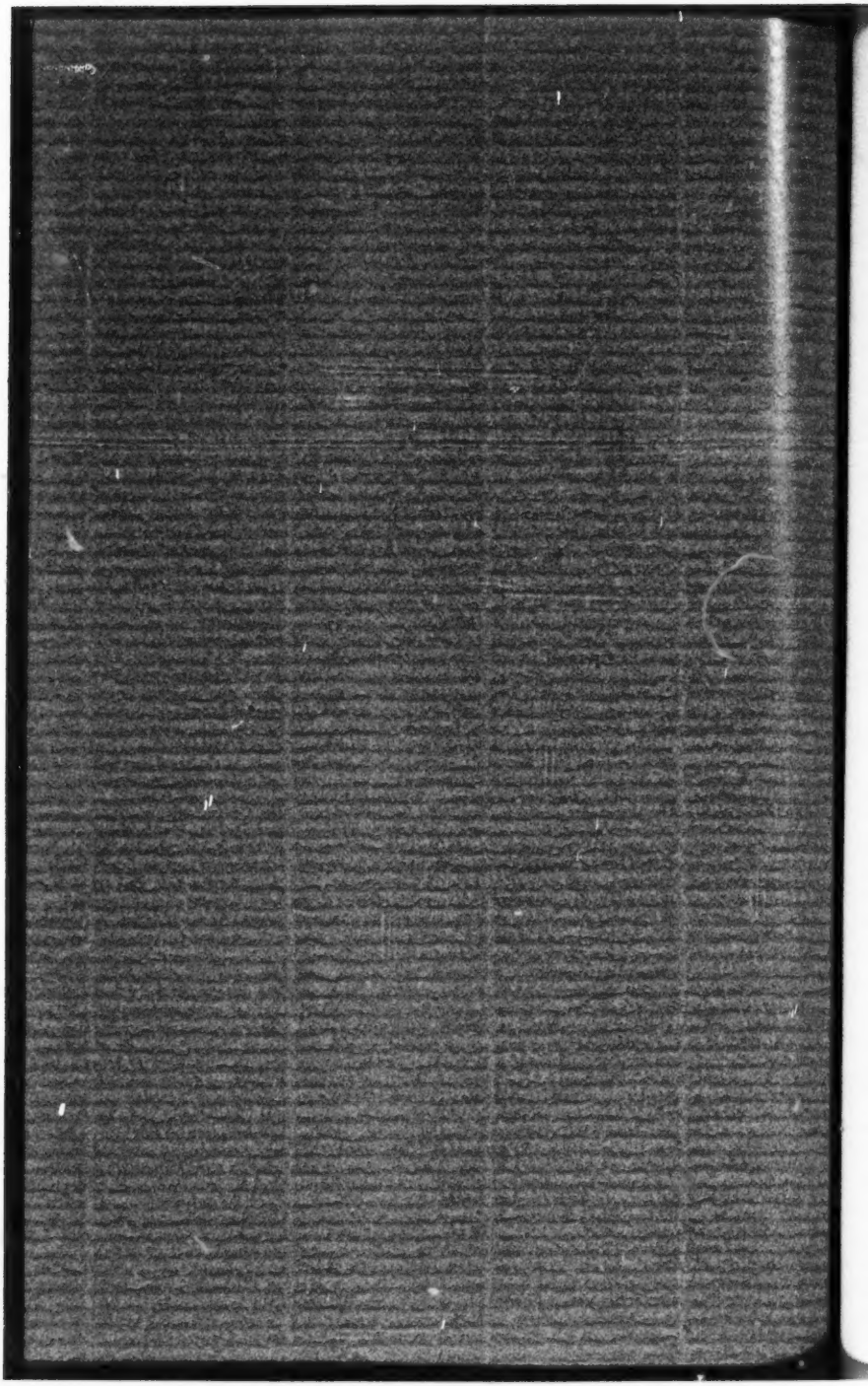

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CERTIORARI.

It is deemed in every way desirable that this paper shall be as brief as practicable, and therefore the fundamental proposition, of the general availability of the case for the writ of *certiorari*, will be assumed, to-wit:

1. The sole ground of Federal jurisdiction in the cause being the citizenship of the parties, the decree of the Circuit Court of Appeals of May 14th, 1897, is "final" and no appeal lies; hence, in the general, *certiorari* lies.

It is almost equally evident that the more meritorious basis for the issue of the writ exists, to-wit:

2. Questions of unusual gravity and importance, not only to the parties litigant, but to the general public—to the legislation and the jurisprudence of the States and the country—are involved; and the application for the writ, upon its very face, shows that these questions are "open to controversy," and demonstrates the necessity for the exercise of the reviewing power of this honorable court, in order to maintain the supremacy of its own rulings, and that consistency, harmony and uniformity which should characterize the most important appellate jurisdiction known to human law, and which the authors of the act of March 3rd, 1891, creating the Circuit Courts of Appeals, so obviously had in mind.

Lau Ow Bew, Petitioner, 141 U. S., 583–587; 144 U. S., 47, 58.

Forsyth vs. *City of Hammond*, 17 S. C. R., 666, 668.

ONLY TWO QUESTIONS INVOLVED.

The petition calls attention to a feature of the case which the record and history of the litigation and the opinions of the judges brings out with great prominence, to-wit: the elaboration of the pleading on both sides. The allegations of the bills are somewhat prolix, and they were several times amended, for which ragged work we shall not attempt further apology. To the bill as last amended, *i. e.*, in the form in which the case was heard and submitted, no less than ten (10) grounds of demurrer were assigned; but, as we think, and as the record shows, these points were gradually weeded out and sifted down until but two questions remained, which were dignified with any notice from the bench, or seemed to be much regarded by counsel on either side, to-wit: as several times stated in the petition.

1. Whether the contract sued upon was against public policy and therefore void?

2. Whether the remedy upon said contract, if any, was at law.

Or, yet more tersely stated, the real defenses are two only—Public Policy and Remedy at Law; and taking them up in inverse order—*first:*

REMEDY AT LAW.

As to this point, it may be that the court would not consider the question of remedy at law, if standing alone, of sufficient importance to jurisprudence or the general public, to justify the allowance of a writ of *certiorari;* yet, lest the cause should suffer unconscious prejudice in the minds of any of the bench, though lack of refence to this question, more especially because the concurrence between two of the judges of the Circuit Court of Appeals was upon this point,—it is deemed proper to call special attention to the fact that his honor, Judge Goff, who, in the Circuit Court, heard full and elaborate argument upon the point, entertained no doubt as to it, but confidently held that the complainant was without remedy at law, and that his case belonged to a class clearly within the jurisdiction of equity, where alone he could find adequate relief.

In the Circuit Court of Appeals, notwithstanding the fact that there was little or no argument upon the point, chiefly because the appellees seemed to acquiesce in Judge Goff's decision of it and to throw their entire strength upon the Public Policy defence which he had sustained, Judge Brawley *dissented* from the judgment of affirmance and held, as we understand his opinion, that the contract of August 9th, 1895, between Hyer and Sheild was not only valid and binding, but enforceable in a court of equity. Certainly he did *not* hold "that the remedy of the complainant, if any he has, is plain, adequate and complete at law."

The closing words of his opinion are "* * * but the plaintiff is entitled either in a suit at law, or by amendment to the bill, to an accounting for such share of the profits of the undertaking as were or should have

been realized under his contract with his co-promoter." This language, taken in connection with that part of Judge Brawley's opinion, in which he says: "I have not thought it necessary to consider carefully the effect upon this contract of the rule stated by Lord Cottenham in *Sharp* vs. *Taylor*, and approved in *McBlair* vs. *Gibbes* and *Brooks* vs. *Martin*, and other cases in this country, although I am inclined to the opinion that the doctrine there announced is directly applicable, * * *," seems clearly to sustain our view of Judge Brawley's opinion.

The Chief Justice, being evidently of opinion that there ought to be a remedy somewhere, called for further argument upon the question whether there was such remedy at law, and it is believed would to-day be far from averse to hearing such argument. It is further believed that such argument will hereafter be had upon this point before this honorable court, and, when that argument is had, it is confidently hoped that this court will concur in opinion with the only Judge who has yet had this question fully discussed before him.

PUBLIC POLICY.

It is not proposed to enter upon a full discussion of this very broad subject. It is without doubt one of the most important and delicate which can come before a judicial body, and has required and received the most laborious, patient and conscientious attention from the loftiest tribunals of the world—this honorable court and the British House of Lords. It goes without saying that, especially in that class of cases to which the case at bar belongs—where the question of public policy is raised as to a contract affecting or connected with proposed legislation—this court would be most ready to grant the writ of *certiorari* to bring before it the record and the decision of another Federal Court, and most especially where, as here, the judges composing that court have divided upon this question.

It may be well at the outset to spread upon the face of this brief the contract under examination—that the court may have it conveniently at hand, and that the view of the eye may lead the thought of the brain.

"New York, August 9th, 1895.

"S. H. G. Stewart, Esq..

"40 Wall Street, City.

"Dear Sir:

"We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Sheild, of Richmond, Va., have this day entered into the following agreement: That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

"It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the Common Council of the City of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

"Among ourselves we will decide what names

are proper to be used in the franchise and the policy we will use in procuring the same.

"Yours very respectfully,

"(Signed) L. H. HYER,

"(Signed) PHIL. B. SHEILD."

The general head of Public Policy, as applicable to the contract embodied in this letter, and to the facts and circumstances set out in the bill as leading up to and following it, divides itself into two questions, the *first* of which may be thus stated:

IS IT NECESSARILY CONTRARY TO PUBLIC POLICY FOR TWO RIVAL APPLICANTS FOR A LEGISLATIVE CHARTER TO UNITE, AND AGREE TO ASK THE GRANT OF THE FRANCHISE TO THEM JOINTLY, GOING OPENLY BEFORE THE LEGISLATIVE BODY AND MAKING A FULL DISCLOSURE OF THEIR CONTRACT AND CO-OPERATION?

The exact relevancy of the question to the case, and the answer that must be returned to it, are equally obvious. Precisely this is what Hyer and Sheild did; and it is not perceived how the propriety or legality of their action can be called in question. The highest public policy, as Judge Brawley says, "requires that men should perform their contracts"; but, if men cannot be allowed to make a contract such as this, and if when made they cannot be compelled to perform it—then there would seem to an end at once to the liberty and the obligation of human contract.

We do not scruple to declare and to insist that this is the case—and the whole case—upon this branch of it. Whatever "loose expressions" (and they were nothing more) there may have been in the original bill as it stood before amendment, capable of being distorted into the semblance or the suggestion of wrong, they were all, after full argument, stricken bodily out, and the complainant was permitted to aver, and did aver, that the utmost candor and publicity was intended and practiced in the

making and carrying out of the contract of August 9th, 1895; that no impression as to the use of illegal or improper influence was intended to be conveyed, and that nothing approximating to it in fact occurred.

When the letter above quoted is read in the light of this statement—which, upon demurrer, must be taken to be true—it may almost be said even that reasonable doubt is excluded. Nothing is left in the case, as a plausible basis for discussion, except the bugbear of "withdrawal of competition," and even this is not a plausible basis in this case, since it is left uncertain in the contract as to the motive power of the projected railway, and whether it should be applied overhead or underground; and in the franchise, as subsequently granted, the city reserved the entire question of motive power, leaving it under the control of the Council, with express reservation of the right to revoke the permission to use electricity as such motive power, or to put any further conditions, restrictions and regulations upon such use. See letter to Stewart, and 5th section of Traction ordinance, page 21 of record.

Upon the question whether the contract between Sheild and Hyer is one of the class of contracts ordinarily condemned and annulled by the courts as violation of public policy, Judge Brawley, in his opinion, says:

"* * * Hyer and Shield were rival promoters, each seeking from the City Council of Richmond a franchise for a street railway on Broad street, and both looked to Stewart, a banker in New York, for the money to carry out the enterprise.

"Hyer had already obtained a franchise from the Council, and was asking for some amendments thereto. Stewart, fearing that the continued rivalry might result in the defeat of both or in the obtaining of a franchise of such nature that capital would not embark in it, advised the parties to come together, and they united in an agreement for mutual co-operation and for an equal division of whatever profits were realized. The agreement does not on its face bear any of the *indicia* which mark a dishonest purpose. It does not show, nor can it be reasonably in-

ferred, that any sinister, extraneous or corrupting influences were to be brought to bear upon the City Council of Richmond to superinduce the granting of the franchise, nor is it alleged that any improper means were to be used to accomplish it, and thus it is clearly distinguished from all that class of cases where the courts have held contracts void as reeking with corruption, such as using official influence for private gain, securing public office for pay, retiring from competitive candidacy under agreements to divide fees, securing public contracts upon like terms, or bargains for lobbying services to influence legislation. None of those elements enter here, and the sole ground upon which the decision rests is that the agreement was calculated to diminish competition for the obtaining of the franchise."

Upon the question whether the coming together of Sheild and Hyer and their agreement to ask the grant of the franchise to them jointly, was calculated to lessen competition for said franchise, to the disadvantage of the public and of the city of Richmond, Judge Brawley further says:

"It is not contended, nor can it be assumed, that Hyer or Shield, either or both, had such control or monopoly of the building of street railways that they could by combination put up the price or demand an unusual or unreasonable franchise or embarrass the city of Richmond, and thus injure or jeopardize the public interest, either by their action or non-action. A rule that might be justly applicable to a kind of business which could not be restrained to any extent whatever without prejudice to the public interest ought not to be arbitrarily extended so as to interfere with that freedom of contract which is a fundamental right."

"The franchise in question was not a thing that was put up at public auction and bound to go to the lowest bidder, where a combination to chill the bidding might be held to be in contravention of the public interest. The City Council of Richmond, faithful, as it must be assumed, to its obligations to the public, was not bound to give the franchise to this or any other combination except upon such terms as it chose to annex, and there was no agreement for any corrupting influences to affect its action. An honest co-operation between two parties to effect an object

which neither could accomplish by itself is not forbidden, although, in a sense, that might tend to lessen competition. There is a competition that kills, as there is a combination that saves. Competition in itself is not invariably a public benefit, and to hold a contract void because its tendency may be to defeat competition it must appear that the benefit to be derived from it is certain and substantial, and not theoretical and problematical. The rivalry of impecunious promoters in the obtaining of a franchise for an important public work requiring large capital for its fulfilment is not of such certain advantage to the public that the law should be invoked to prevent its suppression. When such men discover a field where capital can be profitably employed, and, seeking its aid at the same source, are informed that the money necessary to develop it can only be obtained upon the condition of their joint cooperation, and they voluntarily combine in furtherance of the enterprise, there can be no objection to it if it is done honestly and in good faith. Unless such a contract, either on its face or viewed in the light of the circumstances surrounding it, clearly discloses the fact that improper means and influences are to be used to accomplish the desired end, it should be sustained. "If there is one thing," says Sir George Jessel in a recent case, "which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice."

"All presumptions are in favor of the legality of contracts—all reasonable intendments are indulged to support them—if capable of a construction that will uphold and make them valid, they are not to be held illegal unless the circumstances are so strong and pregnant that no other reasonable conclusion can be drawn from them, for intention to violate the law is not to be presumed."

The following are some of the leading authorities which establish the qualifications and limitations of the doctrine as to the invalidation of contracts, by provisions tending to the *lessening or withdrawal of competition*—limitations which clearly exclude the case at bar from the class of contracts held void upon this ground, and which

are ably applied to the facts of this case in the extract just given from Judge Brawley's opinion:

Kearney vs. *Taylor*, 15 How'd, 493, 519–521.
Wicker vs. *Hoppock*, 6 Wal., 94, 97–8.
Atchison vs. *Mullen*, 43 N. Y., 147, 150–51.
March vs. *Russell*, 66 N. Y., 288.
Smull vs. *Jones*, 6 W. & S., 122.
Phippen vs. *Stickney*, 3 Met., 384, 388–9.
Gibbs vs. *Smith*, 115 Mass., 592–3.

PRESUMPTION IN FAVOR OF THE VALIDITY OF CONTRACTS ASSAILED AS CONTRARY TO PUBLIC POLICY:

Registering Co. vs. *Sampson*, L. R. 19 Eq. Cases, 462, 465.
Lewis vs. *Davison*, 4 M. & W. (Exchq.), 653.
Aubin vs. *Holt*, 2 K. & Johns, 68.
Sessions vs. *Dixon*, 5 B. & C., 758.
Bennett vs. *Clough*, 1 Barn. & Ald., 461.
Gale vs. *Leckie*, 2 Starkie, 107.
Tallis v. *Tallis*, 1 El. & Bl., 391.
Rousillon vs. *Rousillon*, 14 Ch. Div., 351.
Hobbs vs. *McLean*, 117 U. S., 595–6.
Bell vs. *Mann & Dozier*, 24 Gratt., 16.
Lorillard vs. *Clyde*, 89 N. Y., 384.
McBrantney vs. *Chandler*, 22 Kans., 692.
Kas. Pac. Ry. Co. vs. *McCoy*, 8 Kans., 546.
Richmond vs. *Ry. Co.*, 26 Iowa, 202.

McBrantney vs. *Chandler*, 22 Kans., 692–3, holds: "There is no presumption that a contract is illegal. He who denies his liability under a contract which he admits having entered into, must make the fact of its illegality apparent. The burden of showing it wrong is on him who seeks to deny his obligation thereon. The presumption is in favor of innocence and the taint of wrong is matter of defence." His Honor Judge Brewer, who decided this

case, so ruled, not only with regard to a contract *for procuring legislation*, but, in 8 Kansas, 542, 546, with regard to a contract providing *for the use of money in procuring legislation;* and also in this 22 Kansas case, that if there was any evidence tending toward the validity of the contract, the case must not go off on demurrer, but be left with the jury. See also *Aubin* vs. *Holt*, 2 Kay & Johns, 68, holding that a contract only savoring of illegality, must be specifically enforced; *Bell & Mann* vs. *Dozier*, 24 Gratt., 16, that to make a contract contrary to public policy, it must be directly and plainly so; *Richmond* v. *Dubuque & S. C. Ry. Co.*, 26 Iowa 191, 202: "The power of courts to declare contracts void, as being against public policy, is a delicate and undefined one, and, like the power to declare a statute unconstitutional, should be exercised only in a case free from doubt." *Hobbs* v. *McLean*, 117 U. S.; and *Lorillard* v. *Clyde*, 86 N. Y., 384; that "Where a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted." "An agreement will not be assumed to be illegal when it is capable of a construction which will uphold and make it valid."

DECISIONS SUSTAINING CONTRACTS ASSAILED AS AGAINST PUBLIC POLICY:

Chesebrough vs. *Conover*, 140 N. Y., 383–387.
Berry vs. *Capen*, 151 Mass., 99–102.
Workman vs. *Campbell*, 46 Mo., 306.
Denison vs. *Crawford Co.*, 48 Iona, 211, 215–16.
Moyer vs. *Cantieny*, 21 Minn., 242.
Beal vs. *Polhemus*, 67 Mich., 130.

See also, in this connection:

Spauldin vs. *Mason*, 161 U. S., 376–397.
Wylie vs. *Cox*, 15 How., 415.
Wright vs. *Tibbetts*, 91 U. S., 252.
Staunton vs. *Embrey*, 93 U. S., 548.
Taylor vs. *Burriss*, 110 U. S., 42.
Bridgford vs. *City of Tuscumbia*, 16 Fed. Rep., 910.

The *second* of the two questions which the law of Public Policy propounds, when applied to the facts of the case at bar, is the following, to-wit:

WHETHER, AFTER A CONTRACT CONTRARY TO PUBLIC POLICY HAS BEEN CONSUMMATED, AND THE FRANCHISE (OR OTHER BENEFIT) CONTEMPLATED IN SUCH CONTRACT HAS BEEN SECURED, AND ONE PARTY HAS APPROPRIATED ALL THE BENEFIT, AND THE OTHER SEEKS JUSTICE AT THE HANDS OF THE COURT AND A FAIR DIVISION; WHETHER, WE SAY—UNDER SUCH CIRCUMSTANCES—A COURT OF EQUITY AND OF CONSCIENCE WILL ENTERTAIN AND APPROVE THE PLEA OF THE WRONGDOER, THAT THE ORIGINAL CONTRACT WAS IMMORAL AND INVALID?

Upon this branch of the case, Judge Brawley expresses himself as follows:

"That Hyer and Shield had made this agreement was no secret. The fact was published in the newspapers in Richmond on the afternoon before the City Council passed the ordinance granting the franchise, and we have no complaint from that city, from the party supposed to be injuriously affected, that the suppression of competition has induced the granting of a franchise not duly regardful of the public interests. The bill states that it was Hyer's intention to lay the whole matter of this agreement before the City Council, and there is no ground for the suspicion that there was any concealment. I have not thought it necessary to consider carefully the effect upon this contract of the rule stated by Lord Cottenham in *Sharp* vs. *Taylor* and approved in *McBlair* vs. *Gibbes* and *Brooks* vs. *Martin*, and other cases in this country, although I am inclined to the opinion that the doctrine there announced is directly applicable. Here the contract to obtain the franchise which is held to be illegal has been consummated, the franchise has been obtained, the aid of the court is not sought to enforce it nor can the franchise be in any manner affected by what it may do; the transaction alleged to be illegal is completed and closed, one of the parties is in possession of all the fruits and the other seems to me to be entitled to recover in an appropriate action his share of the realized profits."

"Public policy requires that men should perform their contracts, and they ought not to be allowed to evade their obligation upon vague and shadowy grounds. If this were a proceeding on the part of the City of Richmond to vacate the charter on the ground that it was obtained by any corrupt practices or by the suppression of fair competition, the court should lend attentive ear to every suggestion of improper conduct on the part of the promoters, but the judicial conscience should not be awakened for the protection of one who seeks to avoid a contract of his own seeking on the ground that it was immoral, and, therefore, that he has the right to make off with the swag."

It will be observed that this second division of Judge Brawley's opinion is not suggested because of any uncertainty in his mind as to the soundness and sufficiency of the first ground upon which his opinion is based—to-wit: that the contract between Sheild and Hyer is clearly not against public policy, but, on the contrary, is free from the faintest taint or trace of any illegality or unsoundness. We desire to express our hearty concurrence in this, Judge Brawley's first and essential position, which we by no means intend to abandon or to discredit by citing and quoting from the authorities to which he, in his written opinion, and the Chief Justice orally, referred upon this second branch of the case.

The following is an extract from the opinion of the court delivered by Mr. Justice Miller, in the leading case, in 2 Wal., 70, 80–81:

BROOKS vs. MARTIN.

That great Judge said:

"In *Sharp* vs. *Taylor*, a case in the English Chancery, the plaintiff and defendant were partners in a vessel, which, being American built, could not be registered in Great Britain, according to the navigation laws of that kingdom. Nor could the owners, who were British subjects, residing in England, have her registered in the United States. They undertook to violate the laws of both countries by having her falsely registered in Charleston, South Carolina, as owned by a citizen and resident of that place. In this con-

dition, she made several trips, which were profitable; and the defendant, colluding with Robertson, the American agent in whose name the vessel had been registered, refused to account with the plaintiff for his share of the profits, or to acknowledge his interest in the ship. When plaintiff brought his suit in Chancery in England, the defendant set up the illegality of the traffic, and the violation of the navigation laws of both governments, as precluding the court from granting any relief, on the same principle that is contended for by the defendant in the present case. It will be at once perceived that the principle is the same in both cases, and that the analogy in the facts is so close that any rule on the subject which should govern the one ought also to control the other. The case was decided by Lord Chancellor Cottenham, and from his opinion we make the following extracts: 'The answer to the objection appears to me to be this—that the plaintiff does not ask to enforce any agreement adverse to the provisions of the act of Parliament. He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor' (the defendant) 'received the money; and plaintiff is now only seeking payment for his share of the realized profits. * * * As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision or some act of Parliament has been violated or neglected? * * * The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any many affected by what the court is asked to do between the parties. * * * The difference between enforcing illegal contracts and asserting title to money which has arisen from them, is distinctly taken in *Tenant* v. *Elliot* and *Farmer* v. *Russell*, and recognized and approved by Sir William Grant, in *Thomson* v. *Thomson*."

"These cases are all reviewed in the opinion of this court in the case of *McBlair* v. *Gibbes*, and the language here quoted from the principal case is there referred to with approbation. We are quite satisfied that the doctrine thus announced is sound, and that it is directly applicable to the case before us."

See also—

Sharp vs. *Taylor*, 2 Phillips' Ch., 801.
McBlair vs. *Gibbes*, 17 How., 233.
Planters Bank vs. *Union Bank*, 16 Wal., 483, 499–500.
Union Pacific R. R. Co. vs. *Durant*, 95 U. S., 576.
Armstrong vs. *Am. Exch. Bank*, 133 U. S., 433, 466.
Farley vs. *Hill*, 150 U. S., 572, 575–6.
Burke vs. *Flood et als.*, 1 Fed. Rep., 541, 548.
W. U. Telgph. Co. vs. *U. P. Ry. Co.*, 3 Fed. Rep., 423, 427.
Kingsbury vs. *Burrill*, 151 Mass., 199, 203.

It is believed that further argument and citation of authorities are unnecessary, and the cause is submitted, with respectful confidence that the *certiorari* prayed for in the accompanying application will be allowed.

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